

A New Castle City Board of Adjustment Hearing (Continuance) took place on July 10, 2008 at 7 p.m. in the City of New Castle's Town Hall.

Present: Mayor John F. Klingmeyer
Roger Akin, City Solicitor
David Athey, City Engineer

Mayor Klingmeyer called the meeting to order at 7:05 p.m. He introduced City Solicitor Roger Akin and City Engineer David Athey.

The Mayor read the Notice of Public Hearing that states, "An application has been filed by Regina Marini for property located at 101 West Third Street, New Castle, Delaware, parcel number 21-018.00-007, seeking an appeal from the Historic Area Commission's denial dated 11/19/07 of her plan to construct a single-family residence on her lot at 101 West Third Street. For the purpose of considering this application, the Board of Adjustment will continue a public hearing on July 10, 2008 at 7 p.m. in Old Town Hall, 2nd floor, located at 201 Delaware Street, New Castle, Delaware.

Notices were advertised in the News Journal and New Castle Weekly papers. Mr. Jeff Bergstrom, City Inspector, confirmed that the property has been properly posted and provided a review of the process to date.

Mr. John Tracey of Young, Conaway, Stargatt & Taylor, presented on behalf of the applicant. He addressed a preliminary issue concerning appeal filing time as questioned by Mr. Bayard Marin, counsel representing Kathleen Klyce and John Wheeler. It is Mr. Tracey's belief that they have met the 20-day timeframe concerning filing for appeals of a decision by HAC. Section 230-51(b) of the Code requires when HAC denies an application it is required to provide the applicant with a written statement containing the reasons for its ruling as well as what corrective action(s) the applicant can take. They received no such statement. They received the minutes that were faxed to the applicant on 11/19/07 and the appeal was filed on 12/7/07, which is within the 20-day period.

Mr. Marin stated the Code is clear that the 20-day timeframe begins from the administrative hearing. This matter appeared three times before HAC before being denied. He argued that the minutes were available after the decision (9/20/07) and the appeal timeline would begin at that time. It was well over two months after the decision that the appeal was taken. If there is another document that should have been sent to the applicant and was not sent, then we still do not have a final decision of the board. He has requested a copy of this document, if it does exist, but has not received anything to date.

Discussion about transcripts from four (4) previous meetings followed. Mr. Tracey was informed by the City that it would be his responsibility to have a transcript prepared. Mr. Akin commented there was no "official" transcript prepared of the September 2007 proceeding, but Mr. Tracey wanted the transcripts (four from HAC) and provided his offer of having the transcripts prepared. The City has those transcripts and they have been made a part of the

record. Summary minutes of the 9/20/07 HAC meeting contain the vote and rationale of HAC members. The appeal was filed after receiving those minutes. No appeal would be filed until receipt of an official decision by an administrative body was received. Mr. Akin advised the Board that the appeal by the applicant is timely based on the information provided by Mr. Tracey and should not be dismissed on the grounds of lack of timeliness.

Mr. Akin made a motion that Mr. Marin's clients' objection to the Board going forward on this matter on the basis of lack of timeliness of the appeal be denied. Mr. Athey seconded the motion. The motion was approved by unanimous vote.

(Mr. Marin feels there should be testimony under oath as to dates Mr. Tracey's client states she received the minutes (11/19/07) and also from Mr. Bergstrom or any other City official as to exactly when things happened. Mr. Akin informed Mr. Marin that he has the right of appeal to challenge any action the Board of Adjustment takes this evening.)

Mr. Tracey began with a history of the property concerning the application from purchase to date. They have two objectives relating to their appeal. The first is Mr. David Bird's participation in the consideration, debate and decision in this matter. He was not a member of HAC in the first two hearings when this matter was discussed, but was a member at the last two and voted in opposition of the project. Mr. Bird raised his objection to this project at the first hearing and, therefore, he should have recused himself. *(He cited a 1975 Delaware Supreme Court opinion involving the New Castle Planning Board.)* Second are the actions of HAC in considering this application. The process seeking approval of the application has taken over ten years. Four issues of conduct raised during the hearings were entered for consideration in this appeal. Sidewalks and street widening—these issues have been raised by the public, HAC and City government alleging the construction of the house will impede widening of the streets or what the house would look like if the streets are ever widened. The applicant has never been presented with any plans indicating street widening is being planned in this area. The HAC cannot refuse to issue approvals over speculation as to what might occur in the future. *(He cited two cases.)* Garage—the original structure had a detached garage located at the rear of the property and the new plan calls for a garage as part of the structure. At the June 2006 HAC meeting they presented a plan showing the garage with entry directly from Third Street. HAC asked and they agreed to move the garage into the site. After making that change at the July 2007 HAC meeting the majority of HAC members requested they retreat the garage into the property and they did this. In September 2007 the applicant showed the change based on a sketch provided by HAC. At the last HAC meeting it was suggested that no garage should appear on this property or revert it out onto Third Street, where it was presented at the first hearing. He offered that having a garage is a necessity and did exist

previously on the original property. Mass—they have attempted to conform to City Code. They are not exceeding the 25 ft. rear yard and 35 ft. height regulations. HAC established the front and side setbacks and confirmed the rear yard setback on September 20, 2006 (6 ft. off South Street, 2-1/2 ft. off the park, 0 ft. off Third Street; the rear yard was always shown to be 25 ft.) Their position is that the mass of the building was established in 2006-07 when all four sides were established and the height of the building complied with Code. They continued to work with the HAC in making changes to dimensions and make it smaller as they moved forward. *(He cited examples.)* They were asked in the third meeting to draw comparisons with properties across the street in terms of height and lot coverage. Height was the same (perhaps 1-1-1/2" taller) and the lot coverage was 55% which was similar to those across the street. In spite of complying with HAC's requests they still felt it was too big. Setbacks were established two visits into the process that the mass had been established so denying it on the basis of it being too big is improper. Mr. Akin asked if mass in a historic district would ever be a part of aesthetics. Mr. Tracey's response was that HAC has a responsibility to deal with properties in their historic context but believes they are not a static entity. They voted on setbacks and approved same in September 2006, yet the applicant continues to reduce the mass of the building at HAC's requests. *(They needed to appear before HAC to determine setbacks prior to appearing before the Board of Adjustment in January 2007.)* Size of building—it was noted in the last Board of Adjustment hearing that Section 230-9(b) of the zoning code prohibited a structure from being built on this lot that was any bigger than what existed previously. That part of the code deals with non-conforming structures. *(Mr. Tracey read that section of the Code aloud.)* In 1998 they did have a non-conforming structure. They are trying to build a structure within the fore lines of their property line making it a conforming structure. The setbacks that were approved by HAC supports it is a conforming structure. There is nothing in the Ordinance or Code of what can be built in an HR district. Mr. Tracey provided a document produced by his office detailing step by step the concerns of HAC and how the applicant addressed those concerns. Mr. Marin does not have a copy. Mr. Akin does not feel there was a legal requirement that this document be submitted to anyone prior to tonight's meeting. *(Mr. Tracey addressed several typographical issues/language issues on the submitted document.)*

Mr. Akin stated that after reading transcripts from the hearings there were some changes to mass made by the applicant during the process. Mr. Tracey said the most obvious change was the narrowing of the building from front to back on the park side (going in from 2-1/2 ft. to 4 ft.) and on the Third Street side from 0 ft. to 1.2 ft. at its closest and closer to 3 ft. at the rear of the Third Street side. There were also changes to gables and decks.

(Mr. Todd Breck was sworn in.) Mr. Todd Breck, architect and engineer for the applicant, described the many changes made to the design.

No questions from the Board at this time.

Mr. Marin addressed Mr. Tracey's statement that Mr. Bird should have recused himself from any of the HAC hearings. He is not aware of any motion made to this respect nor has he seen this in the record. Concerning conflict of interest in Board members he cited a case that said absent an administrative rule/statute, such members should be disqualified only if they show direct personal interest in the outcome of the case. He said that the applicant made a promise to the City that that property with a house on it would be preserved and this is in writing. The applicant requested a demolition permit to destroy the small portion of the building on the first floor behind the original house that faced South Street. The demolition permit was issued and then the City was told that the rest of the house fell down. He claimed the structure became a non-conforming use because of the applicant's actions. The original footprint should have been followed as a matter of law. He suggested that reconstruction could have been performed, which is rare, on the basis of what was there. Absent of reconstruction they have a right to build something; they should build something that had previously existed. All properties along Third Street face this property. They are now contemplating building a larger building on the South Street side than what previously existed. The original building was 50 ft. or less and now they are proposing 75 ft. The visual effect to the historic district is the side of a building. mass is cubic feet and they propose to double the mass of the property. He referred to Section 239 that provides a guideline as to what the size this building should be and HAC took this into consideration when denying the application. The street-widening issue, if done, will require a wall, another visual addition, made necessary by allowing the applicant to build the structure as planned.

(Mr. Marin feels that sworn testimony is in order as to how the structure was demolished.)

Mr. Tracey countered that demolition of the structure took place in 1998. No citations were issued, no charges were filed, and no one was convicted of wrong doing. As to a letter existing where the applicant promised to preserve the structure, he is not aware of such a letter.

Mrs. Regina Marini (*sworn in by the Mayor*) said that at the time she purchased the property she appeared before City Council and asked them to allow her to put up an 8 ft. fence to preserve the property. Since it was already condemned and scheduled for demolition by the City, they informed they had to tear down that portion of the property and taking down the back part of the property caused the demolition. She purchased the property after it was already condemned and due for demolition.

Mr. Jeffrey Bergstrom, City Building Official, was asked to provide a statement of the events ten years ago and was sworn in accordingly. In 1998, prior to Mrs. Marini's purchase of the property, the City architect and he obtained a

search warrant to inspect the home. They were joined by a structural engineer and a couple of P.E.'s and condemned the structure at least a dozen different ways and evicted the family living in the structure at the time. He confirmed that condemnation occurred and also the elements leading to demolition occurred prior to Mrs. Marini's purchase of the property. Mr. Marin read aloud the letter dated 6/10/1997 containing Mrs. Marini's agreement to preserve the property. Mr. Athey questioned the legal ramifications associated with this letter and the demolition. Upon reviewing the letter, Mr. Tracey stated that the Marini's, as equitable owners, do commit to rebuild the property in conformity with Code. It does not specify they promise to build the same building or rehabilitate the building that was on the property. The letter also recognizes the danger the property poses, requests to erect a fence around it, and requests to retain an engineer to determine structural soundness.

The demolition permit was for the rear portion of the building. No City personnel were notified when the entire structure was demolished. Mr. Marini's company performed the demolition and the Marini's paid for the demolition.

Mayor Klingmeyer questioned Mr. Bergstrom about what initiated the demolition. He responded that a portion of the building had caved in making it unsafe.

(Everyone providing testimony were sworn in.)

Robert Dill, 112 West Third Street, testified that he witnessed the demolition of the building and that it was intentional and described how it was done. He added that he had been informed that there are plans to widen Third Street. *(The Mayor is unaware of any plans.)*

Dorsey Fiske, 26 East Third Street, also testified that she was informed by a past City Council official of plans to widen Third Street. She questioned how large the garage would be and what type of driveway surface was being considered. It was noted that the garage would be a two-car garage and the driveway (25 ft.) surface has not been determined to date.

Kathy Klyce, lives across the street, stated that the consensus of the HAC was that the structure was too big. No one objects to building the same size structure; they do not agree that it is good to destroy a historic house then build something larger. She also questioned whether the new structure was being created for the purpose of it being a bed and breakfast.

Mrs. Robert Dill, 112 West Third Street, feels the larger structure does not belong in a historic area.

Susan Flook, East Second Street, asked if the owner needs to apply for permits, etc. if they intend to build a bed and breakfast. Mr. Bergstrom indicated there are limited Code requirements in the Code concerning whether a bed and breakfast is an allowable use in a historic zone.

Mr. Tracey stated that the biggest non-conformity of the previously existing house was that it existed in the South Street right-of-way, Third Street right-of-way and Battery Park. The original survey shows the house crossed over into

the South Street right-of-way and crossed over into the Third Street right-of-way making it non-conforming. However, the reconstruction (of the same building) provision of the Code only applies if you are building within 18 months and are building that non-conforming structure in which case you are limited to the footprint that previously existed. The law disfavors non-conforming uses. If you wait beyond the 18-month timeframe you cannot rebuild the same building with the same footprint. Rather, whatever you build must comply within existing Codes.

Mr. Athey questioned why a vote was taken at the fourth HAC meeting and whether the applicant could come back for a fifth meeting. Mr. Tracey responded that the architect requested that they had been to HAC on three occasions and had done everything they were asked to do. The applicant concluded that a vote was appropriate.

Mr. Tracey said the size of the building was discussed at the first HAC meeting (June 2006) and the applicant made adjustments. At the September 2006 meeting the applicant asked for approval of setbacks and received same. The issue of mass was not brought up until 15 months into the process.

Mr. Marin said neighbors would be agreeable to something appropriate to historic standards, smaller and within the original footprint of the building. The neighbors are seeing the side of a building which is inappropriate for the historic district.

(Sworn in by the Mayor.)

Sally Monigle, Chair of the HAC, said there were a number of issues concerning mass and scale, and they decided to interpret HAC guidelines. We were concerned about streetscape, elevation and the impact of the mass and scale of the structure. We addressed these issues each meeting and tried to get it scaled down. We finally took a vote in good conscious.

Mr. Athey asked Ms. Monigle if HAC approved the setbacks in September 2006 and she concurred. In subsequent meetings HAC sought height, elevation, mass and scale setbacks. Sometimes it takes several meetings to get through a process. She added there was a good-faith effort on the part of the applicant to make changes but not enough to approve it.

Mr. Tracey went on the record lodging an objection to Ms. Monigle's testimony. Statements that HAC raised were already presented and it is not appropriate in this forum for a member of that Board which issued that decision to go back and further explain that decision beyond what is on record.

Mr. Akin stated that he does not believe the Board is precluded from hearing such testimony in a unique proceeding. He asked Ms. Monigle if at any of the

hearings she felt unduly pressured or influenced by any member of the HAC or did she exercise her own judgment. Ms. Monigle said they are a small and independently-minded group and that she made her own decision.

Mr. Breck stated that the height of the house is prescribed by Code. Concerning the elevation, the roadway is low and the left side is up about 5 ft. and we are up about 9 ft. That makes a delta of about 4 ft. (*information contained in fourth HAC meeting*). We were asked to look at the percentage of coverage and the scale at the third HAC meeting. Everyone was comfortable that that level of scale was not out of keeping with what we were asked to do. At the end of the third HAC meeting we were given a sketch with more changes. We did exactly what we thought the Board wanted us to do when we returned for the fourth HAC meeting. We would have been willing to tweak it again.

Mayor Klingmeyer asked Mr. Breck how the applicant's plan fits into zoning requirements of 1,700 sq. ft., 2-1/2 stories and 35 ft. He informed their plan is for 2-1/2 stories and 34.6 ft. HAC has requested they go below those figures to reduce mass and we did continue to lower the building. The garage is built into the hill and is high enough that it would have been similar to other buildings that would be built in the area. From grade to the top of the building is 35 ft. or less. The Mayor informed that HAC rules do not give them any say in the 2-1/2 stories and 35 ft. Mr. Breck added that in an effort to reduce the mass they did reduce the height.

Mr. Athey said the purview of HAC over building height is a matter of opinion. Under the powers and duties of HAC in the zoning code it discusses building context in relation to surrounding buildings. He asked Mr. Breck if he had height information pertaining to surrounding buildings.

Mr. Akin noted for the record that the Mayor's Office provides the Board of Adjustment with materials that trigger hearings. We have not been provided all submissions made to HAC during the hearings.

Materials pertaining to the third HAC meeting on 7/26/07 and the fourth HAC meeting on 8/20/07 were entered into record as Applicant Exhibits 5 and 6 respectively. One of the exhibits shows the Marini residence at 34 ft., 4 inches and an existing house across the street at 33 ft. 0 inches. (*Discussion about other houses heights in the area followed.*)

Due to the volume of information presented to the Board this evening, additional time is required for review in order to make a decision. The record will remain open.

(Discussion about the posting of continuation of this meeting followed.) Mr. Akin suggested a posting at the town office of this adjourned meeting and he feels a newspaper publication of the continued hearing would be appropriate.

Mr. Marin will be provided all pertinent information as well. All materials from other HAC meetings are to be submitted to the town office as soon as possible.

The date of the next hearing could not be determined at this time and will be readvertised following proper meeting guidelines.

Mr. Akin made a motion to adjourn this hearing to consider new materials (materials handed up by Mr. Tracey) presented, the record be kept open, and he can review legal authorities that counsel has provided. Mr. Athey seconded the motion. The motion was approved by unanimous vote.

A motion to adjourn the hearing was made, seconded and approved unanimously. The hearing was adjourned at 9:30 p.m.

Respectfully submitted,

Debbie Turner
Stenographer

Applicant Exhibits:

- 1) Color photograph of 'Area Closed' sign.**
- 2) Sign regarding closure of the park at 9 p.m.**
- 3) Two-page document entitled 'Applicant and Subsequent Changes.'**
- 4) Lateral view of another structure.**
- 5) 7/26/07 HAC Meeting information.**
- 6) 8/20/07 HAC Meeting information.**